Supreme Court, U.S.
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No. 99-1521

IN THE

Supreme Court of the United States

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL and DEWEY BULL TAIL,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS RED WOLF AND BULL TAIL

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I. SIGNIFICANCE OF TRIBAL ROAD.

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court made a definite point of cautioning lower courts that existing tribal court jurisdiction over accidents occurring on a tribal road within a reservation would not be displaced by the court's ruling. *Id.* at 442. The Ninth Circuit's ruling in this case, is "wholly remarkable" for its complete disregard of that directive.

The facts of this case are far from similar to those in *Strate*. Indeed, as far as Red Wolf is able to determine, this is the first case to come before this Court since *Strate* which involves an accident on a tribal road within a reservation. There could, therefore, hardly be any "conflict" with any other decision.

For BN to argue that Red Wolf's Petition does not raise an issue "worthy of review", necessarily belittles the "worthiness" or wisdom of the Court's effort to limit *Strate* to non-tribal roads. Red Wolf's Petition is a legitimate response to the Court's invitation to clarify the parameters of tribal court jurisdiction in those cases where, as here, tribal members are killed as a result of an accident occurring on a tribal road within a reservation.

Strate did not, contrary to BN, require an accident to occur "wholly" or "entirely" on a tribal road. The Court did not use such limiting terms and it is inappropriate for BN to suggest otherwise. BN emphasizes that the accident occurred entirely within its 150 foot right-of-way. It is just as accurate to say that the deaths occurred entirely on the tribal road. If this case does not "squarely present" the tribal road issue, then no case will. This case is worthy of review so the Court's intent to preserve the tribal road issue will not be rendered meaningless.

BN disputes the factual determinations that the road was a tribal road and that state and local law enforcement officials lacked authority over the accident investigation. BN's argument highlights the problem with the federal courts' disregard for the exhaustion of tribal court remedies doctrine. These issues were pending before the tribal court when the district court was improperly and prematurely allowed to intervene. Indeed, the tribal court of appeals had already taken judicial notice of the occurrence of the accident on a tribal road. It was, however, never given the opportunity to finally determine the "tribal nature" of the accident investigation.

This case merits review for the precise reason that it involves an accident occurring on a tribal road. *Strate* intended to remove such cases from the ambiguous "equivalency" analysis of whether one right-of-way might be similar or different from another type of right-of-way. *Strate* did not create a "one size fits all" right-of-way rule and this case presents the opportunity for the Court to clarify its jurisprudence in this critical area of the law.

II. SIGNIFICANCE OF RIGHT-OF-WAY GRANT.

Strate could not have created a uniform right-of-way rule not only because of the existence of the tribal road exception, but also because every right-of-way is not created equal. When Congress created the railroad right-of-way in this case, it did not divest or "defease" the Crow Indians of their rights. On the contrary, Congress specifically required the operation of the railroad to be conducted with "due regard" for Indian rights. No such granting language existed in *Strate* or any of the other cases relied on by BN.

The congressional language of the right-of-way grant makes it impossible for this right-of-way to be the

"equivalent" of land alienated to non-Indians. This Court held in *United States v. Soldana*, 26 U.S. 530 (1918), that the right-of-way grant did not divest Indian title to the land encompassed within the right-of-way. Congress specifically included the language "due regard for the rights of the Indians" for the express purpose of protecting Indian rights to their land. The Crow Indians did not "alienate" anything by virtue of the right-of-way grant, neither title to the land nor their rights with respect to such land.

The Crow Tribal Courts and the Crow Law and Order Code were established, with the blessing of Congress and the Executive Branch, for the purpose of adjudicating Indian rights. The Indian Tribal Justice Support Act, 25 U.S.C. § 3601, *et seq.*, specifically establishes tribal courts "as the appropriate forums for the adjudication of disputes affecting personal and property *rights*". Combined with the congressional language of the right-of-way grant, these federal acts illustrate the intent that Indian rights adversely affected by railroad operations on the subject right-of-way are to be adjudicated in tribal court. These arguments could not have been considered and rejected in *Strate*, where no such right-of-way language existed.

III. SIGNIFICANCE OF EXHAUSTION DOCTRINE.

Because of the lower courts' disregard of the exhaustion of tribal court remedies doctrine, the Crow Appellate Court was never given the opportunity to review the merits of this case. It is highly inappropriate, under these circumstances, for BN to attempt to poison the perceptions of this Court with allegations of wrongdoing by the deceased tribal members, when such allegations were rejected at trial and have never been examined for accuracy by any reviewing court. By far the worst "procedural defect" in this case has been BN's utter disdain for the legitimacy and competency

of the Crow Tribal Courts, an attitude which has been specifically condemned by this Court. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18-19 (1987).

The fallacy of BN's argument against tribal court exhaustion is that this case is *not* a case "such as" *Strate* where tribal court jurisdiction was "plainly lacking". Taken to its extreme, BN's argument means that tribal court jurisdiction is "plainly lacking" in *any* right-of-way case, regardless of the circumstances. Under BN's analysis, the exhaustion rule, which was meant to be a "prudential" rule in favor of tribal court jurisdiction, would instead become an "unyielding" barrier to such jurisdiction.

BN's citation to other cases requiring exhaustion simply proves the Ninth Circuit's error in this case. In *Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 1999), the court emphasized the significance of Indian land ownership to the jurisdictional inquiry. *See also El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999). The court also emphasized that the *Strate* holding would not apply to an accident occurring on a tribal road within a reservation. *Id.* at 1025. Because the incident in *Hicks* occurred on tribal lands, exhaustion was required. The Ninth Circuit held likewise in *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999).

This case requires tribal court exhaustion for the very reason that tribal court jurisdiction is not plainly lacking. The accident occurred on a tribal road, on Indian owned land, and was caused by the failure of the railroad operating on such land to give due regard to the rights of the Indians as required by Congress. The combination of these factors, mandates tribal court jurisdiction and application of the exhaustion rule.

IV. SIGNIFICANCE OF LACK OF ALTERNATIVE REMEDY.

The question of whether Red Wolf has an alternative forum in state or federal court if tribal court jurisdiction is foreclosed, is anything but settled. BN's arguments prove this very point. The court should grant *certiorari* to resolve this conflicting issue. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *cf. Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984).

V. CONCLUSION.

Red Wolf's Petition should be granted.

Respectfully submitted,

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